

USAWC STRATEGY RESEARCH PROJECT

IMPACT OF THE INTERNATIONAL CRIMINAL COURT ON UNITED STATES NATIONAL SECURITY
POLICY

by

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ABSTRACT

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The primary focus of this paper is to address the key issues associated with the creation of the International Criminal Court (ICC) and its impact on U.S. national security decision making and the current and future role of the United States military in international affairs. As this paper will demonstrate, the United States always supported the principles of establishing a permanent international criminal court. This paper will address five key areas. First, it will outline the U.S. principles relating to the creation of the ICC. Second, it will address U.S. policy issues, concerns and objections regarding the ICC. Third, it will review current U.S. policy regarding the ICC and the international community. Fourth, it will analyze the impact of the ICC on U.S. national security decision making and the potential impact on current and future U.S. military operations – with a focus on peacekeeping operations, current military operations in Iraq and U.S. efforts in combating the current Global War on Terrorism (GWOT). Finally, this paper will provide a summary and recommendation on what U.S. policy should be in dealing with the ICC.

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IMPACT OF THE INTERNATIONAL CRIMINAL COURT ON UNITED STATES NATIONAL SECURITY POLICY

We want to make clear that the United States rejects the purported jurisdictional claims of the International Criminal Court (ICC) – and the United States will regard as illegitimate any attempt by the court, or state parties to the treaty, to assert the ICC's jurisdiction over American citizens.

- Defense Secretary Rumsfeld, May 6, 2002

Mr. President, I wish to take a few minutes to express my deep disappointment...to the "unsigning," as they called it, of the International Criminal Court...This decision, in my view, is irresponsible, it is isolationist, and contrary to our vital national interest.

- Senator Dodd, May 13, 2002

On May 6, 2002, the United States formally renounced any commitment and involvement to the 1998 Rome Treaty that created a new and permanent International Criminal Court (ICC). At the request of President George W. Bush, the United States Mission at the United Nations forwarded a letter to Secretary-General Kofi Annan stating that the "United States does not intend to become a party to the ICC treaty...and accordingly, [the United States] has no legal obligation as a result of our signature [to the treaty] as of December 31, 2000."¹

When President Clinton signed the treaty December 31, 2000, on the very last day a signatory could sign onto the treaty, he expressed U.S. concerns over "significant flaws" in the "Rome Treaty" [these flaws to be discussed later in the paper]. He hoped that by signing the treaty it would continue to keep the United States diplomatically engaged and provide a forum to help 'fix' the treaty. Although he signed the treaty, President Clinton stated he would not forward the treaty in its current form to the Senate for ratification and that he would further recommend to the incoming Bush Administration that they, too, not forward the treaty for ratification. The Clinton Administration had reached a diplomatic impasse with the treaty assembly regarding acceptable terms for an international criminal court, despite having played a key role in the initial negotiations regarding the need for an international criminal court.

The United States 'unsigning' of the ICC Treaty in May 2002 generated much political and diplomatic debate, both domestically and abroad. Although the Bush Administration's actions were consistent with the Vienna Convention on the Law of Treaties², the international scorn was overwhelming. European allies and some American critics are worried that the Bush Administration's dealings with the ICC will lead to more instability around the world and intensify resentment at what is perceived as U.S. unilateralism. As this highly publicized debate unfolds

on the international stage, the impact on U.S. national security decision-making and the future shaping of our military engagement strategy could be significant.

The primary focus of this paper is to address the key issues associated with the creation of the ICC and its impact on U.S. national security decision making and the current and future role of the United States military in international affairs. As this paper will demonstrate, the United States always supported the principles of establishing a permanent international criminal court. This paper will address five key areas. First, it will outline the U.S. principles relating to the creation of an 'international criminal court.' Second, it will address U.S. policy issues, concerns and objections regarding the ICC. Third, it will review current U.S. policy regarding the ICC and the international community. Fourth, it will analyze the impact of the ICC on U.S. national security decision making and the potential impact on current and future U.S. military operations – with a focus on peacekeeping operations, current military operations in Iraq and U.S. efforts in combating the current Global War on Terrorism (GWOT). Finally, this paper will provide a summary and recommendation on what U.S. policy should be in dealing with the ICC.

This paper will begin with a discussion and overview of the history and evolution of the ICC, followed by a short synopsis of the jurisdictional procedures of the ICC.

HISTORY AND EVOLUTION OF THE INTERNATIONAL CRIMINAL COURT

At the conclusion of World War II, war crimes and egregious crimes against humanity committed by Germany and Japan demanded the formation of a War Crimes Tribunal to hold accountable those individuals directly and/or indirectly responsible. As a result of international outcry, the Nuremberg and Tokyo War Crimes Tribunals were created to justly hold accountable those actors who ordered or were complicit in their actions.

It has been over 50 years since the United Nations first recognized the need to establish an international criminal court to prosecute crimes of genocide. In United Nations Resolution 260 of December 9, 1948, the General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide, "recognizing that at all periods of history genocide has inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required."³ Article I of the convention defined genocide "as a crime under international law" with Article VI stating that persons charged with genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction." At the same convention, the General Assembly also asked the International Law

Commission “to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide...”⁴

In 1951, the International Law Commission concluded that the creation of an international court to try persons charged with genocide and other crimes of similar gravity was both desirable and possible. In 1953, the commission forwarded a draft statute to the United Nations General Assembly for consideration and adoption; however, the Assembly decided to postpone ratification of the statute pending adoption of an approved definition of aggression. An agreement on the definition could not be reached, in large part due to Cold War tensions between the United States and USSR, effectively tabling the resolution for over forty years.

More recently, U.S.-led efforts spurred by events in Rwanda, Bosnia-Herzegovina and Kosovo caused the United Nations to establish ad hoc tribunals to deal with crimes against humanity and acts of genocide in those countries. The creation of these ad hoc tribunals provided the impetus and model for the creation of a permanent court whose existence would deter the types of atrocities that occurred in earlier wars and punish guilty actors should deterrence fail.⁵ Also during this time, the nation of Trinidad and Tobago initiated requests to the United Nations seeking the formation of an international court. It was widely believed by these lead nations that a permanently standing international court would better serve the international community, serve as a stronger deterrent to such heinous crimes and act more quickly than previous ad hoc war crimes tribunals.

In February 1995, the Coalition for the International Criminal Court (CICC), a coalition of over 1000 Non-Governmental Organizations (NGO), endorsed the need for an ICC by lobbying the United Nations for support. They supported the establishment of an independent international criminal court to hold accountable those individuals / parties complicit in committing crimes against humanity.

On July 17, 1998, a treaty calling for the creation of the first permanent international tribunal for the trial of war crimes and other serious breaches of humanitarian law was proposed in a United Nations conference in Rome attended by 160 countries. This treaty, commonly known as the “Rome Statute” or “Rome Treaty,” created the International Criminal Court. All parties to the convention were required to sign the treaty by December 31, 2000 – as did President Clinton – if they wanted to be part of the international process of designing the court and refining the judicial terms and procedures of the ICC. The treaty was ratified on April 11, 2002 and went into force July 1, 2002. Under the provisions of the statute, the treaty entered into force on the first day of the month after the 60th day following the date on which the 60th country submitted its intent of ratification to the United Nations. As of October 2002, more than

80 countries have ratified the court's founding treaty – notable exceptions include the United States, China, India, Pakistan, Indonesia, Iraq and Turkey. Of interest is that leaders of 53 countries, to include Russia, Israel, Egypt and Iran, have signed but their legislatures have not yet ratified the treaty.⁶

The Rome Treaty affirms that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.”⁷ The ICC's jurisdiction extends to all countries – both signatory and non-signatory – regarding acts of genocide, crimes against humanity, war crimes and crimes of aggression. Although the Court is required to first defer cases to nations for prosecution by their national court system, it can exercise jurisdiction if a nation is unwilling or unable to prosecute. United Nations Secretary-General Kofi Annan indicated in a speech that the Court's intent is to bring to justice key figures – civilian leaders and military personnel – who have perpetrated egregious crimes against humanity...

For nearly half a century—almost as long as the United Nations has been in existence – the General Assembly has recognized the need to establish such a court to prosecute and punish persons responsible for crimes such as genocide. Many thought...that the horrors of the Second World War—the camps, the cruelty, the exterminations, the Holocaust—could never happen again. And yet they have. In Cambodia, in Bosnia and Herzegovina, in Rwanda. Our time—this decade—even has shown us that man's capacity for evil knows no limits. Genocide...is now a word of our time, too, a heinous reality that calls for a historic response.⁸

STRUCTURE OF THE INTERNATIONAL CRIMINAL COURT

The ICC is composed of the Presidency, the Judiciary Chambers, the Office of the Prosecutor and the Registry. On March 11, 2003, the Assembly of State Parties elected eighteen judges of the Court by secret ballot [elected members come from: Bolivia, Ireland, Mali, United Kingdom, Trinidad and Tobago, France, Germany, Canada, Finland, Ghana, Costa Rica, Cyprus, South Africa, Italy, Samoa, South Korea, Brazil and Latvia].⁹ Eighty-eight nation members of the Assembly of the State Parties participated in the election at a special ceremony in The Hague, which is where the ICC will be based

The Presidency is composed of the President and the First and Second Vice-Presidents, all of whom are elected by an absolute majority of the eighteen judges for a three-year

renewable term. The Presidency is responsible for the administration of the Court, with the exception of the Office of the Prosecutor.

The Judiciary Chambers of the Court is composed of three divisions: the Appeals, Trial and Pre-trial Divisions. The Appeals Division consists of the President and four other judges. The Trial and Pre-Trial Divisions have no less than six judges each. The Pre-Trial Division reviews the initial findings to determine if there is enough criminal evidence to refer the case to trial. The Trial Division tries the case to determine guilt or innocence. If the ruling is appealed by either party, it is referred to the Appeals Division for final disposition – the Appeals Division has final appellate authority.

The Office of the Prosecutor is an independent body of the Court responsible for receiving information on crimes within the jurisdiction of the Court. The mandate of this Office is to conduct investigations and prosecutions that fall within the jurisdiction of the Court. The Office may start an investigation upon referral by a state party or by the United Nations Security Council acting under Chapter VII.

The Registry is responsible for the non-judicial aspects of the administration and servicing of the Court. The Registrar is the principle administrative officer of the Court exercising his/her duties under the authority of the President of the Court.

PROCEDURAL OVERVIEW OF THE INTERNATIONAL CRIMINAL COURT

It is important to understand the basic procedural rights of the ICC, because it is with some of these jurisdictional claims that the United States has issues. The ICC has the jurisdictional right to prosecute under three conditions: first, when a nation's court is unable to prosecute due to domestic reasons (i.e., civil war, or no judicial process exists); second, when a nation's court refuses or is unwilling to prosecute the case; and finally, when the Court determines that an investigation and/or trial was not conducted in good faith. It is also important to understand that the ICC prosecutes cases regarding egregious crimes by civilian and military leaders and personnel, not nation states, and that the ICC does not take the place of a sovereign state's court. Further, for the ICC to act on any case, its jurisdiction must be accepted by the sovereign state in which the crime was committed or by the state of the nationality of the accused, unless the case is referred by the United Nations Security Council.

Cases are referred to the Court by one of five methods. First, a signatory to the treaty refers the case to the ICC. Second, a country that has ratified the treaty or acknowledges the Court's jurisdiction sends the case to the ICC. Third, the United Nations Security Council refers the case, which is subject to veto by any of the five permanent members – France, Great

Britain, Russia, China and United States. Fourth, Non-Government Organizations (NGOs) can refer cases and evidence of crimes to the prosecutor for consideration. Finally, the three judge panel from the Pre-Trial Division approves a case submitted by the ICC Prosecutor.

There is a procedural requirement to determine evidential admissibility. The ICC has several criteria to determine admissibility. The case must have a level of severity commensurate to war crimes. As a matter of procedure, the ICC cannot accept a case if it is being investigated or prosecuted by a sovereign state. The right or protection from 'double jeopardy' is guaranteed by the ICC. A person cannot be tried twice on the same crime(s) if he has already been tried by either his sovereign court or the ICC.

The last step in the judicial process is the prosecutor's decision to proceed with a case. Trial is by a three-judge panel – not a jury – and the maximum sentence is usually 30 years, although in extreme cases it may be life in prison; the death penalty is not a sentencing option.¹⁰

U.S. SUPPORT OF INTERNATIONAL CRIMINAL COURT PRINCIPLES

The United States has been a world leader in promoting the rule of law and has been committed to working with the United Nations for the last several years in helping to shape the ICC and the necessary safeguards to prevent politicization of the process. Both the Clinton and Bush Administrations believe that a properly created court with constitutional guarantees and safeguards similar to those of U.S. courts would be a useful tool in promoting human rights and holding the perpetrators of egregious crimes accountable before the world.¹¹ In the past, the United States supported prosecution of crimes by military and civilian leaders and the establishment of an international court. The Clinton Administration advocated to the United Nations the need to create a permanent ICC to prosecute those parties complicit in criminal action. As was highlighted earlier, the United States was the primary player in establishing the Nuremburg and Tokyo tribunals following World War II. These tribunals set the precedent for the creation of an international court to try individuals on war crimes.

While the Bush Administration opposes the Rome Treaty as written [to be discussed in more detail in the next section of the paper], it shares many of the same goals and principles with its supporters. In a press statement made on May 6, 2002 by the Under Secretary for Political Affairs, Marc Grossman stated that "our differences are in approach and philosophy...the United States believes in the promotion of the rule of law...that those who commit the most grievous crimes against humanity should be punished...that states, not international institutions or organizations are responsible for exercising jurisdiction in the international system, and that the best way to combat these serious offenses is to build

domestic judicial systems, strengthen political will and promote human freedom...we [U.S.] have concluded that the ICC does not advance these principles.”¹²

U.S. POLICY ISSUES AND OBJECTIONS

While the United States has always supported the original idea of creating an international criminal court, in the end, the Bush Administration decided not to support the Treaty for a number of reasons. The Clinton and Bush Administrations, as well as key ranking members in the House and Senate, believed the ICC undermined the authority and role of the United Nations Security Council in maintaining international peace and security. In the United Nations’ haste to create an international criminal court, there was a conscious refusal by the Treaty assembly to constrain the Court’s power over the United States’ objection. The Treaty assembly believed that there were ample procedural checks and balances in the process to discount U.S. concerns. The United States unsuccessfully argued during the convention that placing this kind of unchecked power in the hands of the ICC “...would only lead to controversy, politicized prosecution and confusion.”¹³ In May 2002, Marc Grossman stated that despite United States arguments “that the Security Council should maintain its responsibility to check any possible excesses [of power] of the ICC prosecutor...in the end, our [the United States] arguments were rejected [by the convention members]; and the role of the Security Council was usurped.”¹⁴

The United States position is rooted in the belief that the U.S. system of government was founded on the principle that, in the words of John Adams, “power must never be trusted without a check.” The United States founding fathers understood that “unchecked power is subject to abuse, even with the good intentions of those who established it.”¹⁵ It was therefore determined by the United States that the Rome Treaty, as written, removed the procedural checks and balances by making the ICC prosecutors and judges answerable to no higher organization or institution other than the court itself. The purported process violates the constitutional guarantees afforded U.S. citizens – the right to trial by one’s peers and an appellate process. These unchecked powers, coupled with U.S. fears of politically motivated prosecution, still remain major stumbling blocks between the United States and the ICC.

There is also U.S. concern over the Court’s attempted jurisdiction over non-parties to the treaty. The Court, as constituted today, can claim jurisdictional authority under Article 12 to detain and try U.S. citizens for crimes committed on the soil of a treaty signatory if the United States refuses to investigate or prosecute the crimes, even though the United States democratically elected representatives have not agreed to be bound by the treaty. The USG

claims that this authority violates the sovereignty of the United States under the Vienna Convention on the Law of Treaties by binding a non-signatory to the Treaty to the terms of the ICC.¹⁶

There is further concern that the ICC "...could also erode the fundamental elements of the United Nations Charter and the democratic right to self defense."¹⁷ The concern of the United States is that the ICC could have a significant effect on the willingness of nations to project military power in defense of their national interests. Marc Grossman said "with the ICC prosecutor and judges presuming to sit in judgment of the security decisions of States without their assent, the ICC could have a chilling effect on the willingness of States to project power in defense of their moral and security interests."¹⁸ The United States asserts that the use of military power by the world democracies is critical to protecting human rights, as demonstrated by the actions taken to stop genocide in Bosnia and Kosovo and to force the Taliban regime change in Afghanistan after decades of domestic abuse, United Nations violations, and support of global terrorism. There is also fear that the sovereign right of self defense through preemptive offensive operations could be challenged by the ICC under the jurisdictional claim of crime of aggression [Article 121], even though the criminal statute is still undefined.

The United States believes that the treaty could also complicate military cooperation – primarily peacekeeping operations – with friends and allies who will now have a treaty obligation to turn over accused U.S. officials and military servicemembers to the ICC, if the United States fails to prosecute. This could complicate the international peacekeeping scene, especially given that U.S. military forces are located in over 100 countries around the world conducting peacekeeping and humanitarian operations.¹⁹

Finally, there are four significant legal concerns with the treaty. First, there is concern for the lack of U.S. due process guarantees. The ICC does not offer the same U.S. constitutional guarantees afforded U.S. citizens, specifically trial by jury. Secondly, as was highlighted earlier, the definition of "crime of aggression" has not been defined, even though the signatories to the treaty are working on an agreeable definition. Under Article V of the treaty, signatories can amend the treaty to define the crime of aggression and specify the conditions for jurisdictional authority. Further, parties to the treaty can 'opt out' of jurisdictional claim of the ICC over crimes of aggression per Article 121 – basically, parties to the treaty get to write laws that they do not have to necessarily follow. Non-parties to the treaty, on the other hand, are subject to prosecution for the crime of aggression under the terms established by the signatories. This jurisdictional claim under Article 121 is a major issue with the United States. Their objection is linked to a previous concern regarding a state's right to project power in defense of their

national interests. The fear is that the ICC could attempt to exercise jurisdictional authority under the statute of crime of aggression – when adopted by the assembly – on U.S. civilian and military leaders using military force in their fight against global terrorism or ongoing combat operations in Iraq. This concern would be further heightened and exacerbated if the United States were to conduct unilateral military operations in pursuit of their national interests over the objection of the international community [Regarding Iraq – as a non-signatory to the treaty, the Iraqi government and military forces can commit egregious crimes against their people on their own soil and not fear prosecution, unless referred to the ICC by the United Nations Security Council. However, in response to the United States invasion of Iraq, the Iraqi government could prefer charges against U.S. personnel for alleged crimes committed against them on their sovereign soil – this would predispose that Iraq acknowledges the jurisdictional authority of the ICC, which would then open the door to ICC prosecution of Iraqi officials and military personnel. Under treaty guidelines, allies and parties to the treaty would be obligated to detain U.S. personnel for possible prosecution by the ICC.]. Thirdly, there is U.S. concern “...that the many parties to the treaty are advocating the conditions for jurisdictional authority to the ICC that could place the Court into conflict with the Security Council.”²⁰ The final U.S. legal concern is regarding the treaty amendment for ‘new crimes.’ As was the case for crime(s) of aggression under Article 121, this, too, is a major issue with the United States. Under Article 121, a party to the treaty can ‘opt out’ of new crimes added by an amendment to the statute, thereby exempting its citizens from the jurisdictional authority of the ICC for these crimes – again, they get to write and/or define laws that they do not have to follow. Non-parties to the treaty, on the other hand, are again subject to the Court’s authority – this time for laws that do not apply to those who signed the treaty.

U.S. POLICY

Since the United States is a non-party to the treaty due to President Bush’s unsigning of the treaty in May 2002, the United States was removed from subsequent negotiations concerning the organization and composition of the court. They were also removed as a voting member in proposing/recommending judicial language and/or procedures in the Assembly of State Parties and ICC Review Conferences. However, the United States still remains an active participant in both bodies, and aside from being an active United Nations observer, the current U.S. policies regarding the ICC are a combination of executive, legislative and diplomatic initiatives.

Initial legislative efforts focused on trying to dissuade President Clinton from signing the Treaty. In March 1998, Senator Jesse Helms sent a letter to Secretary of State Madeline Albright warning that any ICC treaty that does not provide for the proper safeguards – i.e., U.S. veto power – would be ‘killed’ on the Senate floor. Representative Bob Ney introduced the “Protection of United States Troops from Foreign Prosecution Act in June of 1999. This bill would have prohibited U.S. aid to those countries that ratified the Rome Treaty. Although the bill never reached the House floor for consideration, it effectively conveyed the message to the administration that many in Congress opposed the ICC Treaty.

Following President Clinton’s signing of the Rome Treaty in December 2000, a number of bills were introduced and ratified in both the House and Senate designed to protect American Servicemembers from ICC prosecution. The American Citizens’ Protection and War Criminal Prosecution Act of 2001 was a more conciliatory approach to the ICC. It required the President to certify to the Senate for advice and consent that the ICC has established and demonstrated “...a record of fair and impartial track record and that the United States maintain a policy of fully supporting the due process rights of all U.S. citizens before foreign tribunals, including the ICC.”²¹

The American Servicemembers’ Protection Act (ASPA) of 2001 was intended to protect members of the United States Armed Forces and other covered persons from the jurisdiction of the ICC. Major provisions of the bill include...

That the United States may not cooperate with the ICC, the ICC may not conduct investigations within the United States, the United States will vote in the Security Council to ensure that U.S. armed forces participating in United Nations peacekeeping missions will be exempt from ICC prosecution, the United States may not participate in any peacekeeping missions unless all U.S. armed forces are exempted from prosecutions and each country in which there are U.S. personnel is not a party to the ICC or has a treaty with the U.S exempting U.S. personnel from prosecution, no ICC member state (except NATO counties and other key allies) shall receive U.S. military assistance and finally, the President can use all means necessary and appropriate to release U.S. or Allied personnel detained or imprisoned by the ICC in the Hague.²²

The ASPA of 2001 received immediate international scorn by European leaders who would ultimately rename this Act, “The Hague Invasion Act.” The ASPA of 2001 would be later amended, attached to the Foreign Relations Authorization Act and reintroduced to the Senate for approval. Known as the ASPA of 2002, it further prohibited U.S. cooperation with the ICC by any federal, state and local entity, agency or government and it restricted U.S. participation in

United Nations peacekeeping operations to missions "...where the President certifies U.S. troops may participate without risk of prosecution by the ICC."²³

The American Servicemembers and Citizen Protection Act of 2002 issued constitutional findings that since the Rome treaty was not ratified by the Senate, the ICC Treaty has no validity with respect to the USG. It proclaims the Treaty to be in violation of international law, the American Declaration of Independence and the United States Constitution.²⁴

In May 2002, the Bush Administration exercised its statutory rights under the Vienna Convention on the Law of Treaties by 'unsigning' the treaty. Having failed to achieve immunity from the ICC, the Bush Administration pursued an aggressive strategy of diplomatic agreements to achieve immunity for U.S. troops as a price for providing continued support to peacekeeping operations. The Administration pursued bilateral agreements under Article 98 of the Rome Treaty with a number of close NATO allies and members of the European Union (EU). Negotiation of Article 98.2 agreements allowed the United States to negotiate international agreements that would prevent the surrender of any American citizen to the ICC. Existing Status of Forces Agreements (SOFA) with NATO members and key allies already constituted de facto Article 98 agreements for U.S. personnel in SOFA jurisdictions.²⁵

In the United Nations Security Council in July 2002, the Bush Administration threatened to veto any fresh or renewed United Nations peacekeeping operations unless U.S. forces were granted immunity from the ICC. The Administration tested its resolve by withdrawing U.S. peacekeeping forces from East Timor (a total of three military personnel) and threatened to veto extending the peacekeeping mission in Bosnia. As a result of U.S. diplomatic efforts, an agreement was passed July 12, 2002, by the United Nations Security Council granting U.S. peacekeepers a year of immunity from the ICC – renewed annually as required.²⁶ The United Nations concessions basically gave the USG a year to make bilateral agreements with individual nation states to protect its military servicemembers and civilian leaders from prosecution and extradition to the ICC. This diplomatic win, coupled with earlier concessions during the drafting of the statutory provisions of the Treaty, required the Court to defer prosecution of a case to the United Nations Security Council when so directed, of which the United States is a permanent member with veto power.²⁷

In August 2002, some members of the EU, whose 15 members had all ratified the ICC treaty, criticized the United States' bilateral initiatives with some of its members, primarily Great Britain, Italy and Spain, as being "inconsistent" with the ICC treaty. However, in late September 2002, the EU foreign ministers, succumbing to U.S. pressure at the objection of human rights groups and the European Parliament, reached an agreement amongst themselves that in effect

prevents EU members from extraditing U.S. soldiers or government officials to the ICC as long as the USG guarantees that any Americans suspected of war crimes will be tried in the United States²⁸ On October 1, 2002, the EU voted and approved the United States' request for blanket immunity for U.S. forces under Article 98 of the Rome Treaty. On that same day, the U.S. State Department confirmed twelve such bilateral agreements had been reached with European allies.²⁹

The EU concessions to the United States were not without possible consequences to the ICC and the international community. David Tolbert, an international law expert, said the U.S. government's opposition to the ICC is "bound to have a detrimental effect" on the Court. He maintains that limiting the Court's jurisdiction – through bilateral agreements and United Nations concessions – will seriously compromise the credibility of the ICC.

The aggressive and 'bullying' approach by the USG to United Nations politics angered close allies such as Canada, Mexico and many European nations. Many viewed the Administration's demand for special protection as further evidence of a go-it-alone arrogance that jeopardizes needed international accords. Proponents for the Treaty further worried that immunity could derail the legitimate war crimes prosecution of other non-signers, including China and Iraq.³⁰

The United States approach in distancing itself from the ICC is also not without significant risk to the United States. The USG's refusal to ratify the Rome Treaty, coupled with its perceived actions to undermine the ICC through bilateral agreements, congressional laws and executive orders, could cause the United States to lose the moral high ground and its influence in the international community. A prominent congressional researcher, Ms. Jennifer Elsea, stated in a congressional report that "...the perceived U.S. willingness to hold United Nations peacekeeping missions hostage to U.S. demands for immunity from the ICC may deepen the rift between the United States and allies that support the ICC...by demanding special treatment in the form of immunity from the ICC, the United States may be seen as bolstering the perception of its unilateral approach to world affairs."³¹ She further explains in her report "...that current U.S. action, combined with threats to exercise its veto authority in the United Nations Security Council for genuine self-interests, could risk U.S. foreign diplomacy, impact future peacekeeping operations and threaten military cooperation – not to mention U.S. credibility."

IMPACT ON U.S. NATIONAL SECURITY DECISION MAKING

The United States National Security Strategy (NSS) of 2002 outlines a number of conditions for the United States to take unilateral action to protect and defend U.S. interests. The NSS states that...

The United States will disrupt and destroy terrorist organizations by direct and continuous action using all the elements of national and international power; defending the United States, the American people and our interests at home and abroad by identifying and destroying the threat before it reaches our borders...we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country.³²

U.S. national security decision makers are concerned with the ICC attempting to exercise jurisdictional authority over the United States for its decision to use military force in fighting global terrorism, enforcing peacekeeping operations and conducting military operations in Iraq. Under Article 12 of the Rome Treaty, which defines the criteria for universal jurisdiction, U.S. national security decision making could be compromised by the risk of judicial prosecution by the ICC for the use of military force. The concern is for the possible attempt by rogue nations and those nations opposed to U.S. foreign policy to submit politically motivated charges against U.S. civilian and/or military leaders. U.S. concerns are not without historical precedence. In December 1999, U.S. fears of prosecution materialized in an International Criminal Tribunal for the Former Yugoslavia (ICTY) report analyzing the NATO air campaign in Kosovo. The ICTY report provided a "legal analysis on the possibility that the NATO allies had committed war crimes during the seventy-eight day campaign against Yugoslavia."³³ The review of NATO's actions in Kosovo was requested by the Russian government and argued by some to be politically motivated by their alliance and support to Yugoslavia during the crisis.³⁴ Although the charges were eventually determined to be unfounded, resulting in no judicial claims or actions by the ICTY, this action legitimized U.S. concerns of potential susceptibility to politically motivated charges.

The judicial empowerment of the ICC could also have a chilling effect on U.S. national security decision makers, adding complexity to the decision process. This complexity involves the potential indictment of U.S. decision makers for their decisions to use military force. The U.S. National Military Strategy outlines the policy tenets of "...protecting the United States homeland and interests' abroad, preventing conflict and unwarned attacks, and prevailing against adversaries in a wide range of possible contingencies, today and tomorrow."³⁵ These

tenets are based upon "...employing military power from disperse locations to overwhelm any adversary and control any situation, while maintaining the flexibility to rapidly conduct and sustain multiple missions throughout the diverse regions of the world."³⁶ Achieving U.S. policy could require the use of military force. If the decision to deploy forces to small scale and/or peacekeeping operations has the possibility of subjecting U.S. forces and civilian leaders to the jurisdictional authority of the ICC, it could sway decision makers and change the entire complexity of the U.S. military and diplomatic engagement strategy. This possible scenario would require diplomatic engagement through bilateral agreements before U.S. forces could be approved and committed. This approach could have a significant impact on the effectiveness of U.S. engagement and involvement in international military affairs.

When considering the USG's current fight against global terrorism and current military operations in Iraq, the impact on national security decision making is significant and very far reaching. The problem set for U.S. civilian and military leaders alike becomes even more complicated when the United States considers preemptive unilateral military action over the objection of the international community. The United States use of military force in the guise of self defense or in the pursuit of national interests will not exonerate U.S. culpability in the halls of the United Nations, given the diverse international opinions and attitudes toward the United States. As a result of the internationally proclaimed reach of the ICC, U.S. decision makers and military leaders will have to cautiously deliberate on their decisions to use military force in pursuit of national interests – this is not to imply that decisions regarding matters of national security are made lightly or that previous U.S. decision makers made hasty and ill-informed decisions. The impact on U.S. decision makers is that they may have to placate the United Nations and the international community to justify their legitimacy in the use of military force, as evident in the recent U.N proceedings regarding the use of force against Iraq for non-compliance to weapons inspections. This approach to international diplomacy could have a monumental effect on U.S. policy and on the decisions to use military force if the United States decides to go it alone. An unpopular decision by the United States on the international stage of world opinion could expose U.S. decision makers to the possibility of politically motivated prosecution by those signatory nations who oppose U.S. policy regarding the GWOT and military handling of Iraq.³⁷

Another area that could have a lasting effect on U.S. decision makers is the undefined statute regarding the crime of aggression and its potential for political or prosecutorial misuse.³⁸ In developing possible definitions for adoption regarding the provision for the crime of aggression, the most widely agreed upon wording is known as "Option 1."³⁹ Option 1 states that

“any individual in a position of exercising control or capable of directing, planning, preparing, ordering, initiating, or carrying out an armed attack against another state when this attack is in contravention of the UN Charter is subject to investigation, trial, conviction and punishment by the ICC.”⁴⁰ It has been argued by the international legal community that this proposed definition would “...in effect, require the United States to receive prior UN Security Council approval...for the legality of a military action.”⁴¹ Should the United States not obtain approval for military force, “every U.S. official involved in the operation, up to and including the President, could be charged, tried, convicted and sentenced merely for protecting U.S. interests.”⁴² The adoption and inclusion of this definition could also have a significant impact on U.S. national security decision making concerning the use of military force in the GWOT, ongoing operations in Iraq and future military operations.

The last issue that concerns U.S. national security decision makers deals with the provision of criminal non-action regarding acts of genocide and egregious crimes against humanity. This concern stems from the United States deciding not to participate with the ICC and downsizing their involvement in peacekeeping operations – both of these actions were deliberate decisions by the Bush Administration. The possible fear is that U.S. non-involvement in certain peacekeeping operations, where the United States has the ability and capacity to intervene, could have ICC implications. Failure to act where there is a duty to act [in peacekeeping and humanitarian operations], has precedent in international war crimes tribunals.⁴³ The Treaty was built upon the “general principles of law” from the participating nations and these provisions allow for the prosecution of criminal non-action by individuals under the legal caveat of new crimes. There is no reason to prohibit the ICC from adopting a failure to act criminal theory on war crimes. It could reasonably be argued that for the United States, that may have the ability and capacity to stop atrocities, failure to act, could in itself be a crime prosecutable by the ICC.⁴⁴ As a counter point to this U.S. concern, any nation – regardless of signatory status – who had the capacity and/or moral duty to intervene could be held liable for non-action.

ALTERNATIVE U.S. POLICY

As highlighted earlier, although the United States gained numerous concessions from the United Nations regarding ICC immunity, and successfully negotiated a number of bilateral agreements with the EU members and many signatories to the Treaty, there are alternative policy options that the United States can pursue in supporting the principles of an international criminal court. The first option is for the United States to remain a non-signatory and pursue a

policy of “selective engagement” regarding peacekeeping operations and missions of military cooperation. The second policy option is for the United States to become a re-signatory to the Rome Treaty and fully comply with its provisions.

In analyzing these policy options, it is important to remember the tenets of the Bush Administration’s policy regarding the ICC: “blanket” immunity for all U.S. armed forces involved in international peacekeeping operations; the United States’ inalienable right to self-defense in prosecuting the GWOT; and the right to use military force to protect and secure its national interests.

In pursuing a policy of “selective engagement,” the United States would unilaterally withdraw from all present and future international peacekeeping operations not in the security interest of the United States, unless “blanket” immunity was granted to all U.S. armed forces and selected personnel by the host nation, United Nations, EU or the ICC – this is different from current U.S. policy where it is negotiating terms of immunity with individual nations through bilateral agreements under the auspice of a one year United Nations exemption from ICC prosecution renewed annually as required. This policy, combined with our veto authority in the United Nations Security Council, could help shape the conditions for change to the ICC charter. This approach would shift peacekeeping responsibility – dollars and resources – from the United States to other international players who are unwilling to grant U.S. immunity – a price the international community may not be able to afford. It would also demonstrate U.S. resolve to the international community regarding matters of the ICC.

The danger of this kind of policy is twofold. First, the United States could become less of a player in the shaping of international affairs. It could be perceived as an international “bully” holding peacekeeping missions hostage to U.S. demands for immunity and putting our self-interests ahead of the needs of the international community. Second, it could undermine or jeopardize U.S. international efforts – coalitions and cooperation – to deploy forces abroad to fight and prosecute the GWOT.

The other policy option is for the United States to become a re-signatory to the Rome Treaty – assuming it passes the U.S. Senate. This would obviously make the United States a latecomer to shaping the court and bound to the ICC, bringing to bear the many U.S. concerns outlined earlier in the paper. In light of the concerns of the Bush Administration, however, there are some advantages to this policy. First, it might allow the United States to become an active player and possible leader in promoting change in the ICC, vice being an observer with no voice and no vote. It could enable change to be made that would alleviate many U.S. concerns with the ICC. It might also exempt the United States from possible prosecution from the undefined

crime of aggression and new crimes that could be added later by the Assembly. Second, it would demonstrate U.S. resolve and goodwill in promoting the internationally accepted body of law. Finally, the ICC membership would bolster U.S. legitimacy in international affairs.

Although both policy options may appear logically viable and sound in the court of public opinion, and could provide U.S. leverage to influence change in the Court, these advantages do not outweigh the current Bush Administration's concerns and stated disadvantages in dealing with the ICC. The problem with both policy options is that they do not address the United States' core issues – constitutional rights and protection of national security – nor do they provide for the same immunity guarantees secured under the current policy. As highlighted earlier, both the Clinton and Bush Administrations had issues with the statutory authority of the ICC. The fundamental judicial issue is that the ICC does not offer the same constitutional guarantees afforded U.S. citizens, specifically trial by jury, checks and balances of the Court's authority, and appeal to a higher appellate court – cases are appealed from the Trial Division to the Appeals Division within the ICC with no judicial oversight from the United Nations. Regarding matters of U.S. national security, the ICC could attempt to exercise greater jurisdictional authority over the United States – as a signatory – for its decision to use military force in fighting global terrorism, enforcing peacekeeping operations and/or conducting military operations in Iraq. It could also hold the United States to a higher legal standard for any preemptive or unilateral action it may take in pursuit of national interests, especially if this action lacks international support.

SUMMARY AND CONCLUSION

The Bush Administration has been severely berated by many domestic and international critics for its isolationist approach in dealing with the ICC. Many European allies and some American critics worry that the Administration's "attitude will lead to more instability around the world and intensify resentment at what is perceived as U.S. unilateralism."⁴⁵ Many international scholars and lawyers, critical of the United States' unsigning of the treaty, claim that U.S. fears of political prosecution are remote and unfounded. In the U.S. Senate, Senator Chris Dodd, an opponent of the Administration's handling of the treaty, said "some in the United States harbor the unreasonable fear that Americans will be taken before this tribunal on politically motivated charges, fears that I believe are unfounded but fears that have not been dispelled with the erasing of our signature...whether we signed it or not, it is becoming the international rule of law."⁴⁶ Despite the assertions of these critics, ample evidence exists that the Administration's

concerns are legitimate and real, and that their concerns will have a sobering effect on U.S. national security decision making.

The Bush Administration's policy approach not only protects U.S. citizens from potential ICC prosecution, it also promotes and preserves our national interests abroad by providing us diplomatic and military flexibility in shaping our engagement strategy. The United States needs to stay the course on its current policy but continue to engage the international community in the U.N. and through diplomatic channels to resolve differences regarding matters of the ICC. The United States needs to strike a balance between U.S. self-interests and international needs, especially if it wants to maintain its viability in the international community. The sobering reality of U.S. policy is that there will be many in the United Nations that will always see the United States as a unilateralist bully protecting and promoting its self-centered interests at the expense of the international community and the ICC.

Word Count – 7,767

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